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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

THE UNITED STATES, PETITIONER

v.

THE CREEK NATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case March 13, 1933.

OPINION BELOW

The opinion of the Court of Claims is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered March 13, 1933. Motion for new trial was overruled December 4, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether under the jurisdictional act which authorizes the Court of Claims to "render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs," there is authority to award a judgment against the United States arising out of an error or errors of its officers, or arising out of its failure in its alleged duty as guardian of the tribe to secure the restoration to said tribe of possession of lands owned by the tribe.

(2) Whether, if the tribe is entitled to recover, the measure of damages should be the full value of the fee as of the time of the filing of the petition, or whether the recovery should be measured as in trespass, namely, the injury to the land and mesne profits.

(3) Whether an erroneous survey approved by the Commissioner of the General Land Office whereby land belonging to the Creek Tribe was placed within the boundaries of the Sac and Fox Reservation and thereafter, pursuant to a cession of the Sac and Fox Reservation to the United States, erroneously patented to settlers, constituted a taking of said land or any interest therein by the United States.

STATUTE INVOLVED

The material provisions of the Jurisdictional Act of May 24, 1924, c. 181, 43 Stat. 139, under which the cause of action was brought, are as follows:

> SEC. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. * * *
>
> SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

STATEMENT

The material findings of fact of the court below may be summarized as follows:

The action was brought under the authority of the Act of Congress approved May 24, 1924 (43

Stat. 139; Special Finding 1), conferring jurisdiction upon the Court of Claims "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims * * * arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, * * *"

By the Treaty of February 14, 1833 (7 Stat. 417; Special Finding II) between the Creek Nation and the United States, the United States granted to said nation in fee simple a tract of land in what is now known as the State of Oklahoma. Thereafter by Treaty of June 14, 1866, between the same parties (14 Stat. 785; Special Finding III), the Creek Nation ceded to the United States the western one-half of the lands granted as aforesaid. Article 8 of the last-named treaty contains the following provisions:

> It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the commissioner of Indian affairs, the expenses of which survey shall be paid by the United States. (14 Stat. 785, Special Finding III.)

In 1871 one Bardwell, under the direction of the Indian Office, and pursuant to the provisions of the last-named treaty, surveyed the line dividing the

Creek lands. Although the survey thus made may not have correctly divided said lands, as was contemplated under the treaty, any error therein made is not material here, because that controversy was settled by an agreement whereby the Creek Nation ceded to the United States "without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six," and also granted and released to the United States "all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation." (Act of March 1, 1889, c. 317, 25 Stat. 757, 758; Findings IV and V.)

On February 18, 1867, a treaty was entered into between the United States and the Sac and Fox Indians, whereby the United States ceded to said Indians, as a reservation, a tract of land not exceeding 750 square miles in the Indian Territory south of Kansas, the reservation to be selected under the direction of the Secretary of the Interior (15 Stat. 495, 496). It developed that the land selected for the Sac and Fox reservation lay within the Creek land ceded to the United States under the

Treaty of June 14, 1866, *supra* (14 Stat. 785). Following the treaty between the Sac and Fox Indians and the United States, one E. N. Darling, in 1872, made a survey of the Sac and Fox reservation and in doing so erroneously ran his division lines between the Creek lands and the Sac and Fox reservation into the Creek domain, thereby including as a part of the Sac and Fox reservation 5,575.57 acres of Creek land. The Darling survey was examined and approved by the Commissioner of the General Land Office on February 15, 1873. (Findings VII, VIII, IX.) In 1875, one Hackbush made a resurvey of Darling's section lines and subdivided the sections into forty acre tracts. In so doing he perpetuated the errors of Darling. Both the Darling and the Hackbush surveys were examined and approved by the General Land Office without knowledge of the errors. (Finding X.)

By an agreement entered into between the Sac and Fox Nation and the United States, approved by Act of Congress of February 13, 1891 (26 Stat. 749), the Sac and Fox Nation ceded all of its reservation to the United States. The agreement provided that, after certain allotments had been made to the Sac and Fox Indians, the residue of the land ceded should become public lands of the United States and subject to white settlement. The 5,575.57 acres of land erroneously included in the Sac and Fox reservation was thereupon opened to settlement and patents to settlers were subsequently issued by the United States. (Findings XI, XII, XIII.)

Controversies arose with respect to the errors in said surveys (see opinion, p. 8, original); thereupon resurveys of the west boundary of the Creek Nation were made in 1895, 1896, and 1905, through which the original boundary line as established by Bardwell was determined to be the west boundary line of the Creek Nation. Thereafter Congress, by Act approved June 21, 1906 (34 Stat. 325, 364), declared the line as established by Bardwell in 1871 and reestablished by the surveys of 1895 and 1896, to be the west boundary of the Creek Nation. (Finding XIV.)

As a result of the erroneous survey by Darling in 1872, plaintiff has been deprived of the use and occupation of the 5,575.57 acres since the date of the Darling survey, with the exception of 118.4 acres which were allotted to members of the Creek Nation and 2.88 acres which were sold as unallotted lands of the Creek Nation. (Finding XV, XVI.)

The court made no finding with respect to value other than as set forth in Finding XIX, as follows:

> The fair average market value, for all purposes, of the land involved, was on July 23, 1926, $30.00 per acre. This value includes the surface, lease, and royalty values.

Whereupon the court allowed plaintiff to recover the sum of $163,628.70, found to be the full value of the land on the date the petition was filed, and held that defendant was entitled to recover from plaintiff on its counter-claim the sum of

$76,805.51. Judgment for plaintiff in the sum of $86,823.19 was thereupon entered.

The petition substantially sets forth the facts as herein stated and seeks a recovery on the theory that it was the duty of the United States, having "entire control of the affairs of" plaintiff, to procure the restoration of possession of the tract of land involved to plaintiff, and having failed in this duty the United States is liable to plaintiff for the full value of the land.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Jurisdictional Act authorizes a recovery on a claim arising out of the failure of the United States to secure the restoration to the Creek Nation of possession of the lands involved.

2. In holding the correct measure of damage to be the value of the land for all purposes, including its surface, lease, and royalty values as of the date the petition was filed.

3. In holding that a "taking" of the land by the United States was not accomplished either by the approval of the Commissioner of the General Land Office of the erroneous Darling survey of 1872, whereby the land was included within the Sac and Fox reservation, or by the opening of said land to settlement and issuance of patents to settlers thereon pursuant to the cession of the Sac and Fox reservation.

REASONS FOR GRANTING THE WRIT

The court below held, in opposition to petitioner's contention, that the facts did not show a taking of respondent's land. It was the theory of petitioner, on the trial below, that there was a taking of the 5,575.57 acres of respondent's land either by virtue of the approval of the General Land Office of the erroneous survey made by Darling, which placed the land within the boundaries of the Sac and Fox reservation, or by the disposal of the lands under the general land laws to settlers following the cession to the United States by the Sac and Fox Indians.

If the court below was correct in holding that there was not a taking, then the judgment for respondent must rest upon one of the following grounds: (a) that petitioner is liable for the errors committed by Surveyor Darling and the Commissioner of the General Land Office, or (b) that petitioner is liable for violation of its duty as a fiduciary to procure the restoration of possession of the land to respondent.

But Congress has not conferred upon the court the authority to adjudicate and award a judgment on a claim based upon either of said grounds. The Jurisdictional Act limits the jurisdiction of the court to claims "arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in

relation to Indian affairs." That is to say, the claim must grow out of a violation of a contractual obligation, or a violation of a right which has become vested by virtue of an Act of Congress relating to Indian affairs.

In many cases heretofore decided this Court has found it necessary to pass upon the scope of Jurisdictional Acts containing substantially the same language as that employed in the instant Act, and without exception has held to the ruling that such Acts must be strictly construed, *Blackfeather* v. *United States,* 190 U.S. 368, 379; *Price* v. *United States and Osage Indians,* 174 U.S. 373; that they make no admissions of liability, *United States* v. *Mille Lac Chippewas,* 229 U.S. 498, 500; and that they do not confer jurisdiction to entertain a claim founded upon a moral obligation or failure in the performance of a political function, *United States* v. *Old Settlers,* 148 U.S. 427, 469; *United States* v. *Choctaw Nation,* 179 U.S. 494, 533; *Barker* v. *Harvey,* 181 U.S. 481.

The decision of the court below is in conflict with the decision of the same court rendered in the case of *Choctaw and Chickasaw Nations* v. *United States,* 75 C.Cls. 494, wherein plaintiffs proceeded under the authority of a Jurisdictional Act which contained the same language, with relation to the scope of jurisdiction, as that used in the instant Act. In that case a recovery was sought upon the ground that the United States had failed in its duty as the guardian of the Indians to take proper steps for the

collection of rentals and for taking forfeitures on railroad station reservations. A demurrer to the petition was sustained. Chief Justice Booth, speaking for the court, in part said (p. 497):

> It is difficult to ascribe to plaintiffs' cause of action any other grounds than an omission to perform a duty cast upon the Government, as the plaintiffs claim by law. If the Government was solely responsible for the loss complained of as a trustee or guardian of the plaintiffs' lands and property, and in that capacity the only party legally capable of asserting plaintiffs' rights in court, and as such negligently refused and continues to refuse to act, this, in our opinion, is a direct and specific allegation of omission to perform a duty, and plaintiffs' cause of action is predicated upon the common law liabilities pertaining to the relationship of guardian and ward. * * *

(Page 499:)

> The policy of the Government as to its relationship with Indian tribes and Indian tribal lands and property is a political one with which we have nothing to do, and until legislation is enacted concerning ancient treaties or acts of Congress the court is without authority to proceed, and even then may not proceed except strictly within the limits and intent of the special act, for it is established law that special jurisdictional acts are to be strictly construed by the court and implications as to jurisdiction under their terms forbidden. *Blackfeather*

v. *United States,* 190 U.S. 368, *Price* v. *United States and Osage Indians,* 174 U.S. 373.

The record in this case fails to show that petitioner has by treaty, agreement, or law of Congress assumed the common law liability of a guardian or a trustee of respondent with reference to the matters herein involved, or admitted a liability for inadvertent or unauthorized acts of its officers.

It seems clear that the only theory upon which a recovery for respondent is justified under the Jurisdictional Act is that the fee to the land, or a lesser estate therein, was taken by the petitioner under the authority of an Act of Congress. A taking is not accomplished by an act of an executive officer of the Government without such authority whether the act be intentional or otherwise. *Bigby* v. *United States,* 188 U.S. 400; *United States* v. *North American Transportation & Trading Company,* 253 U.S. 330, 334.

MEASURE OF DAMAGE

The injury has arisen either out of a taking of the land or out of a continuing trespass. The court below having held that there was not a taking, the damages awarded necessarily arise from the trespass. In view of the fact that the Government is never a trespasser (*Pope* v. *United States,* 26 C.Cls. 11, 13), such trespass must have been committed by the Sac and Fox tribes of Indians and by the patentees of the petitioner.

Therefore if under the Jurisdictional Act there is authority to award a judgment against petitioner to compensate respondent for losses caused by petitioner's failure to perform the alleged duty as guardian of respondent of procuring the restoration of possession of the land to respondent, or for a trespass brought about through errors of officers of petitioner, it is urged that the measure of damage is precisely the same as would apply in a case where the action was against the trespasser, namely, injury to the land and mesne profits. However, the court below awarded a recovery for the full value of the land as of the time of the filing of respondent's petition, thereby adopting the same measure of damages as would be applicable if there had been a taking of the entire interest of respondent in the land on that date.

That the court below committed error in determining the measure of damage is apparent for the further reason that although the judgment does not destroy the Indians' title to the property, or their right of possession, the award is made to cover its full value as if all right, title, and interest therein had been taken. The bar of former adjudication would be unavailing in an action to recover for trespass accruing subsequent to the judgment. It is a well-established rule that in a trespass or a series of trespasses which amount to an appropriation or an attempt to appropriate the land itself or its use to the use of the trespasser, damages are to be assessed for the trespass only and not for the

permanent appropriation of the land. *Stowers* v. *Gilbert*, 156 N.Y. 600.

Upon the authority of the decision in the case of *Fort Berthold Indians* v. *United States*, 71 C.Cls. 308, and other decisions of the same court, it was the contention on behalf of petitioner in the court below that the acts of the officers of petitioner, as set forth in the findings, constituted a taking of the land by petitioner and that the damages for the taking should be held to be the value of the land as of the date of such taking.

If under the correct view of the case there was a taking, it follows that the court below has erred in its determination of the amount of damages.

It is therefore contended:

(a) That if the court below correctly held that there was not a taking, the petition of respondent should be dismissed for want of jurisdiction.

(b) If, however, there was a taking or if under the Jurisdictional Act respondent is entitled in law to recover for losses arising either from the errors of petitioner's officers, or arising out of petitioner's failure to perform its alleged duty as guardian of respondent of procuring the restoration of possession of the lands to respondent, the court below has adopted an erroneous measure of damages.

WHEREFORE, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH, 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934